

Supreme Court, U. S.
FILED

AUG 21 1978

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-118

GERALD W. ROLL and PATRICIA J. ROLL,
Petitioners,
—v.—

WEST SIDE FEDERAL SAVINGS AND LOAN ASSN.,
Respondents.

**BRIEF IN OPPOSITION TO THE PETITION FOR
WRIT OF CERTIORARI**

TURCHIN & TOPPER, P.C.
*Attorneys for Respondent West Side
Federal Savings and Loan Assn.*
60 East 42nd Street
New York, New York 10017
(212) 661-0420



INDEX

	<u>Page</u>
QUESTION PRESENTED.....	1
STATEMENT OF CASE.....	1
ARGUMENT.....	3
CONCLUSION.....	8
 Statutes and Regulations:	
15 U.S.C. § 1635.....	1, 2, 4
12 C.F.R. § 226.9.....	1, 2
Fed. R. Civ. P. Rule Rule 12(b)(6).....	2
Title 42 U.S.C. § 1985....	2, 3
Title 42 U.S.C. § 1983....	2, 3
12 C.F.R. § 226.9(g).....	3, 4
15 U.S.C. § 1635(e).....	7

BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF
CERTIORARI

QUESTION PRESENTED

Whether the unanimous finding of the Court of Appeals that this transaction was exempt from the requirement of a right to rescind notice pursuant to Title 15 U.S.C. § 1635 and Regulation Z, 12 C.F.R. § 226.9, merits review by this Court?

STATEMENT OF THE CASE

This is an action commenced by Petitioners Gerald W. and Patricia J. Roll (Rolls) against Respondent West Side Federal Savings and Loan Ass'n (West Side) asserting three causes of action. The first alleged the Rolls entered into a transaction with West Side in May 1975 in which they borrowed \$55,000 to finance the construction of a home on their property in Dutchess County, New York State, but were never advised by West Side of a right to rescind the loan pursuant to Title 15 U.S.C. § 1635 and

Regulation Z, 12 C.F.R. § 226.9. They alleged in this cause of action that West Side violated the Civil Rights Act, 42 U.S.C. § 1983. The second and third causes of action alleged violations of Title 42 U.S.C. § 1985.

The District Court granted West Side's motion to dismiss for failure to state a claim for which relief can be granted pursuant to Fed R. Civ. P. Rule 12(b)(6). The grounds were (1) there was no state action within the terms of Title 42 § 1983, (2) there was no class-based discrimination within Title 42 § 1985 and (3) there was no right to rescind the loan pursuant to Title 15 U.S.C. § 1635 and Regulation Z. Upon the Rolls' application for reargument the District Court adhered to its previous ruling.

On appeal to the Second Circuit Court of Appeals, the Court affirmed, holding there was no right to rescind and no notice requirement because the loan was in connection with the initial



construction of the home and that the second and third claims were without merit because the bank did not act under color of law within 42 U.S.C. § 1983 and because there was no claim of class-based discrimination under 42 U.S.C. § 1985.

On this application the Rolls attack the decisions of the Courts below insofar as they held the language of Regulation Z, 12 C.F.R. § 226.9(g) exempted this loan from the requirement of a notice to rescind. They also argue that if 12 C.F.R. § 226.9(g) does exempt this transaction it was invalidly promulgated. We submit that the Rolls' arguments are unsupported and do not merit review by this Court.

ARGUMENT

The Rolls Did Not Have a Right to Rescind This Loan

We urge that the Courts below correctly found that the Rolls did not have a right of

5

6

7

8

9

rescission and that therefore there was no notice requirement.

Title 15 U.S.C. § 1635 provides that notice of a right to rescind the loan transaction shall be given pursuant to regulations promulgated by the Board of Governors of the Federal Reserve System. The controlling section of Regulation Z, promulgated thereunder, 12 C.F.R. § 226.9(g) provides for certain exemptions to the right to rescind as follows:

"Exceptions to general rule [(a) refers to the right to rescind]. This section does not apply to:

* * *

(2) A security interest which is a first lien retained or acquired by a creditor in connection with the financing of the initial construction of the residence of the customer, or in connection with a loan committed prior to completion of the construction of that residence to satisfy that construction loan and provide permanent financing of that residence whether or not the customer previously owned the land on which that residence is to be constructed."



We submit that this was a construction loan within the meaning of the above language. Therefore, the Rolls did not have a ^{*/} right to rescind this loan. The loan was issued in connection with the initial construction of a home for the Rolls and the mortgage granted West Side a first lien on the premises.

The Rolls knew this was a construction loan. In their complaint (paragraph 7) they stated:

"That on or about December 31, plaintiff obtained a building loan and mortgage commitment from the defendant bank in the sum of \$55,000.00 (FIFTY-FIVE THOUSAND DOLLARS)."

*/ The entire loan was advanced to the Rolls and it was only after West Side commenced a foreclosure action because the Rolls, since June 1976, failed to make any payments on the loan, neither interest nor principal, that they claimed they should have been given notice of a right to rescind.

The mortgage itself stated (paragraph 42) that it is subject to a building loan agreement dated May 21, 1975, which was made a part of the mortgage. The building loan agreement stated it is a loan from the bank for the purpose of building a home on the property. In addition, while allocating \$26,320.86 of the loan proceeds to satisfy a pre-existing mortgage on the land, it provided that the balance of the loan was to be advanced in accordance with a stipulated construction schedule.

We submit that the fact that the prior mortgage on the land was satisfied out of these loan proceeds makes no difference. The two exceptions in subparagraph (g) of Regulation Z are first, a first lien to finance the acquisition of a dwelling, second, a first lien in connection with financing the initial construction of a residence. In the instant case the language of the second exception should control, without regard to whether or not any part of the loan was used to pay off

the prior mortgage on the land. The evidence is indisputable that this was a loan "in connection with the financing of the initial construction of the residence of the customer...."

The Exemption Contained In
Regulation Z was Validly
Promulgated

The Rolls also argue that the Board of Governors of the Federal Reserve System exceeded its authority in issuing Regulation Z to the extent it exempts this transaction from the rescission requirements. We submit that the Second Circuit was correct where it specifically stated in its opinion that Regulation Z was "properly issued".

Subdivision (g) to Regulation Z does no violence to the language of the statute. 15 U.S.C. § 1635(e), exempts from the notice requirement a transaction in which one finances "the acquisition of [a] dwelling". Subdivision (g) includes a loan in connection with the

construction of a dwelling as an exempt transaction. The difference between a loan for "acquiring" or "constructing" a dwelling is not so great as to constitute a departure from the intent of Congress as expressed in the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TURCHIN & TOPPER, P.C.
Attorneys for Respondent
60 East 42nd Street
New York, New York 10017
(212) 661-0420

Of Counsel:

Morton J. Turchin



THE ALPERT PRESS INC., 644 PACIFIC ST. BKLYN., N.Y.